

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

COWBELL, LLC

Respondent

v.

BORC BUILDING AND LEASING CORP. AND
KNIGHT CONSTRUCTION COMPANY

Appellants

DOCKET NUMBER WD72052 and WD72231

DATE: November 9, 2010

Appeal From:

Circuit Court of Jackson County, MO
The Honorable William Stephen Nixon, Judge

Appellate Judges:

Division One
Thomas H. Newton, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

Attorneys:

James B. Jackson, Independence, MO

Counsel for Appellants

Attorneys:

Hugh L. Marshall, Kansas City, MO

Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

COWBELL, LLC, Respondent, v. BORC BUILDING AND
LEASING CORP. AND KNIGHT CONSTRUCTION
COMPANY, Appellants

WD72052 and WD72231

Jackson County

Before Division One Judges: Thomas H. Newton, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

Owners of interests in BORC and Knight (the Corporations) executed contracts placing three parcels of land up for sale in an auction “as is” and “without reserve.” Cowbell placed the winning bid. The Corporations refused to transfer ownership of the land, and Cowbell sought specific performance. Without making a finding as to the value of the land, the trial court found the Corporations bound by the sales contract and ordered the land conveyed to Cowbell. It also granted Cowbell’s request for attorney fees incurred at trial. The Corporations appeal, raising four points.

AFFIRMED. MOTION FOR ATTORNEY FEES ON APPEAL IS GRANTED AND REMANDED FOR DETERMINATION.

Division One holds:

In their first and second points on appeal, the Corporations argue that the trial court erred in ordering specific performance because, they contend, the contracts were not validly executed. Specifically, the Corporations argued that the contracts were invalid because certain statutory procedures and corporate formalities under the articles of incorporation were not followed. We do not agree.

All owners of interests in the Corporation signed the contracts to auction the land. A corporation cannot fail to elect directors, fail to update records, fail to sign in a corporate capacity, and then use its own failure to comply with these formalities to defeat the claims of third parties with which it contracted. Under these circumstances, noncompliance with the formalities did not invalidate the agreement. The Corporations’ first and second points are denied.

In their third point on appeal, the Corporations contend that the trial court erred in rejecting their argument that the sale was unconscionable. They contend the land was worth \$785,000 and that to order the sale performed at the winning bid, \$27,500, was unjust. Inequality in value between the subject matter and the price, standing alone, does not rise to the level of unconscionability that requires the refusal of specific performance. Rather, we determine whether an agreement is unconscionable in view of the circumstances in which the contract was made.

Our review of the circumstances surrounding execution of the contracts does not point to inequity. No imbalance of contracting power was shown. The Corporations agreed to auction the property “without reserve.” When an auction is made “without reserve,” an owner enters into a collateral contract with anyone bidding at the auction, promising that the property will be sold to the winning bidder. The contract gave the Corporations an option to set a reserve price on the auction for an additional fee, but the Corporations rejected the option. Consequently, just as Cowbell agreed to bear the risk of the “as is” sale, the Corporations agreed to bear the risk of “inadequate” consideration. The Corporations’ third point is denied.

In their fourth point, the Corporations argue that it was unconscionable to award Cowbell its attorney fees at trial. If a contract provides for the payment of attorney fees and expenses incurred in the enforcement of a contract provision, the trial court must comply with the contract terms and award them to the prevailing party. Here, the contract directed that the prevailing party was entitled to attorney fees. The Corporations’ fourth point is denied.

Finally, Cowbell has moved for an award of attorney fees and expenses incurred in this appeal. In accord with the parties’ contract, Cowbell is entitled to attorney fees. Because the trial court is better equipped to determine a reasonable amount, we remand to the trial court for a hearing on the attorney fees issue.

Opinion by: Thomas H. Newton, Judge

November 9, 2010

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